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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 845 Sup. 113.

THOMAS M. ADAMS and E. C. MEANS, Executors with the will annexed of the estate of THOMAS W. MEANS, deceased, *Appellants*,

vs.

BENJAMIN R. COWEN, EVAN F. WILLIAMS and A. S. FRAZER, Trustees, *Appellees*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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To the Supreme Court of the United States:

The Appellants respectfully pray for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Sixth District, and annex hereto a statement of the case and of their grounds for the petition. They file printed copies of the record in the Circuit Court of Appeals, and a certified transcript of the proceedings in that court.

LAWRENCE MAXWELL, JR.
Of Counsel for the Petitioners.

JULIUS L. ANDERSON,
JOHN F. HAGER,
Of Counsel.

STATEMENT OF THE CASE.

Thomas W. Means, a resident of Kentucky, died testate June 8, 1890, leaving four children, John Means, William Means, Margaret Means and Mary A. Adams, and one grandson, the only child of a deceased daughter. He devised his estate equally between these four children and his grandson. The controversy arises upon the fifth clause of his will, to wit [Record, 48]:

"Item 5. I have made advances to my said children, which are charged to them respectively on my books, and I may make further advances to them respectively, or to some of them, and to my said grandson, which may be charged on my books to their respective accounts; I desire the equal provision herein made for said children, and the provision for said grandson to be a provision for them respectively, in addition to said advances made, and that may hereafter be made, and that in the division, distribution and settlement of my said estate, said advances made, and that may hereafter be made, be treated not as advancements but as gifts, not in any manner to be accounted for by my said children and grandson, or the issue of any of them."

The advances referred to in the foregoing clause were advancements of over $100,000, which the testator had already made to each of his children, including William. Subsequently, in 1884, he made further advancements so that each child, including William, had received $180,000, and with that the testator closed his advancement accounts on his books. He was then over seventy.

Subsequently, commencing in 1888, and within a period of sixteen months of the testator's death, one of his children, William Means, *borrowed* from him the sum of $280,311.42, for which he executed promissory notes, payable with interest to the order of the father. Some of the notes were secured by collaterals and others stated on their face that they were to be charged against and deducted from the maker's share as legatee of his father. William Means made payments on these notes

so as to reduce the balance due upon them to $136,035.75. After his father's death he made a settlement with the administrators (the appellants), giving the following receipt:

"Ashland, Ky., October 16, 1890.

Received of Thomas M. Adams and E. C. Means, administrators with the will annexed of the estate of Thomas W. Means, deceased, the sum of one hundred and thirty-six thousand and thirty-five and 75-100 dollars, being a part of my distributable share as legatee under said will applied by them as ordered by me upon the following notes and claims owed by me to the estate of said decedent, and payable to his order, viz:

[Here follows description of ten notes, with balance due on each, aggregating $136,035.75.]

This receipt is given in pursuance of settlement made October 16, 1890.

WILLIAM MEANS.

Attest: John F. Hager.

A. E. Lampton."

The present suit is brought by persons claiming to be assignees of William Means, to recover his full fifth share in his father's estate, in disregard of the foregoing settlement, and without deduction of the amount due upon his notes. The Circuit Court dismissed the bill, holding that the balance due on the notes were proper off-sets against William Means' share of his father's estate. The Court of Appeals, reversing the decree of the Circuit Court, held that the plaintiffs, as assignees of William Means, are entitled to recover his full fifth share without deduction of his debt of $136,035.75. In other words, they give to William Means' assignees a double portion of the estate.

I.

The Court of Appeals admit that the money represented by William Means' notes was not a gift or advancement, but that it was a loan or *debt* which might have been enforced against

him by his father during his lifetime, but that the *loan* was forgiven and discharged under the fifth clause of the will.

We submit that the fifth clause of the will does not cancel *debts* due from children to the testator, but that it relates simply to *advancements*.

This is conformable to the notions of justice, which from the earliest times have led courts of chancery to bend their energies (whether in interpreting wills or administering estates) so as to secure equality among children. The same public policy is disclosed in the statutes which everywhere require children to account for advanced portions. It is true that the testator meant to give his children the benefit of certain advances, but his dominating purpose was equality, and that provision was not meant to work a double or triple portion.

Under the Court of Appeals' construction of the fifth clause of the will, William Means gets a *double portion;* and if his father had died before the original advances of $280,311.42 had been reduced by payments thereon to $136,035.75, he would have gotten his equal share as legatee, and $280,000 in addition. If the $280,000 had been paid to him as a *gift* or *advancement*, that would be a proper result. But the question is whether the testator meant by the fifth clause to convert into a gift what he had advanced to a child, not by way of gift but by way of *loan* upon the distinct understanding that it should be repaid to him.

We are not confronted with any question of fact under this head, because the Circuit Court of Appeals find that William Means' notes evidenced *debts*, and not advancements.

To some of the notes were attached agreements in the following form [Record, 212]:

"The above is for money loaned to me by Thomas W. Means, on account of my indebtedness as executor and trustee of the estate of A. Labrot, deceased, and it is agreed as part of the transaction by which I have procured a loan of $45,000 upon the foregoing note, that the amount thereof and all interest shall

be paid from my interest as devisee or distributee of the estate of Thomas W. Means.

WILLIAM MEANS."

The Court of Appeals ignores these express charges on the legacy on grounds not mentioned in the bill. The only evidence on the subject is that of the attorney who prepared and advised the contract, viz:

"We advised Mr. John Means to use this form of note with the writing attached, *that it might clearly and beyond question, under any construction of the fifth clause of the will*, appear that the money so furnished his brother should be a loan, and in no sense an advancement under the terms of that will." (R. 727, 728.)

It is well settled that a legatee's receipt is evidence of the character of the advance, and to show that it was made on account of the legacy. Cowles vs. Cowles, 56 Conn. 240.

If this court is of opinion that William Means, under the fifth clause of the will was not entitled to deduct from his legacy these *debts* due from him to his father, especially in view of the agreements under which the loans were obtained, the judgment of the Court of Appeals must be reversed, because it is conceded that the administrators are entitled to set off debts against the legacy.

II.

But assuming that William Means' debts were not (as an original proposition) set-offs against his legacy, the question remains whether the settlement made by him October 16, 1890, with the administrators, can be set aside. The bill seeks to set this settlement aside upon the ground that the plaintiffs were prior assignees of William Means' interest in his father's estate, and that the settlement between the administrators and William Means was made in collusion with William Means in fraud of

the plaintiff's rights as the real owners of the legacy. The Circuit Court of Appeals do not find that William Means had made an assignment of his legacy to the plaintiff prior to his settlement of October 16, 1890. They set the settlement aside on the ground that the administrators were trustees of William Means and not competent to accept from him a settlement by which he relinquished an interest in the estate to which as matter of law (assuming that his *debt* was not deductible from his legacy) he was entitled.

No such ground for setting aside the settlement is alleged in the bill. If it were alleged, the decision of the Court of Appeals ignores the proposition that it is competent for persons to adjust a disputed claim and that it is no ground for setting aside such a settlement that the claim settled is not well founded in point of fact.

In Callisher vs. Bischoffsheim, L. R. 5 Q. B. 449, which is the leading English case, the defendant being sued on a promise made in consideration of the compromise of a claim, set up that at the time of the compromise agreement, nothing was in fact due to the plaintiff. But the court sustained a demurrer to the plea.

Blackburn, J., said:

"If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated."

Cockburn, C. J., said:

"If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. * * *

"It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it; in that case his conduct would be fraudulent."

In Stewart vs. Stewart (6 Cl. & F. 911, 966), Lord Chancellor Cottenham quotes with approval the following words of Lord Hardwicke, approving the doctrine of Lord Macclesfield:

"An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation for an agreement."

"If the solemn compromise of the parties is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said that a compromise is an unavailing, idle act, which questions even the power of the parties to bind themselves." Fisher vs. May, 2 Bibb, 448.

Union Bank of Georgetown vs. Geary, 5 Pet. 99, involved an agreement under which the endorser of a note had waived all defence and permitted a judgment to go against her upon the promise of the plaintiff that it would issue an execution immediately against the maker, who was represented to have property sufficient to satisfy the judgment. The plaintiff having failed to keep its agreement by issuing execution, sought to escape from the consequences of its breach by insisting that the indorser had in fact no good defence and that her agreement to waive defence and suffer judgment was therefore no consideration. But this court held that the consideration was sufficient, even though one of its own later decisions showed that the defence of the endorser (which alleged the insufficiency of a demand made on the fourth instead of the third day of grace) could not have prevailed. Mr. Justice Thompson said:

"It is unnecessary to examine whether this defence would have been available or not. The validity of the contract did not depend upon that question. It is enough that the bank considered it a doubtful question, and that they supposed they were gaining some benefit by foreclosing all enquiry on the

subject. . . . To permit a subsequent judicial decision on this point in their favor, as having a retrospective effect, so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning *a most mischievous principle.*"

But it is just this "most mischievous principle" that the Court of Appeals recognizes when it permits William Means' assigns to repudiate the settlement of October 16th, because that court if of opinion that the claim of the administrators, which he then settled, could not have prevailed if contested.

The settlement was made by William Means under the advice of competent counsel, and after protracted negotiations with the administrators.

We respectfully submit:

1. That William Means is not entitled to a double portion, but that his *debt* of $136,035.75 to his father's estate should be deducted from his legacy.

2. That the question whether he was entitled to such a deduction was settled by an agreement between the administrators and himself, acting under the advice of counsel, and that no ground was presented by the bill and found by the court for setting the settlement aside.

LAWRENCE MAXWELL, JR.
Of Counsel.

In the opinion denying the rehearing, the court of Appeals says:

"This court did not find that there was any fraudulent combination between the administrators and William Means in making the settlement of October 16, 1890, to defeat the rights of the beneficiaries under the complainants' trust, and to that extent practically sustained the defendants' contention; but upon other grounds held that the complainants were entitled to recover the amount of the legacy."

In other words, the court ignores the bill as framed, and sustains it simply as a bill to recover a legacy. This was clearly error.

1. Because William Means' legacy had not been assigned to the plaintiffs prior to the filing of their bill.

2. The will provides that no final settlement can in any event be required before three years after the testator's decease. The bill was filed before that time. In In re Spencer (16 R. I. 25, 31) it was held that where a testator had declared that his executors "should have five years in which to settle his estate," a legatee could not maintain a suit for his legacy within that time.